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IN THE
COURT OF APPEALS OF INDIANA

STEVEN HARRINGTON EMBRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A03-0708-CR-392
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0405-FD-506

March 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Steven Embry appeals his sentence for leaving the scene of an accident resulting in serious bodily injury as a class D felony.[1] Embry raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Embry; and

II. Whether Embry's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm and remand.

The relevant facts follow. On May 25, 2004, at 2:15 a.m., Embry was driving a vehicle containing three other passengers in Steuben County. Embry missed a curve and struck a utility pole. Embry and two of the passengers fled the scene on foot. Jennifer Snellenberger, a passenger, suffered a severely fractured right lower leg and remained at the scene. The police located two of the passengers who identified Embry as the driver and indicated that Embry had been drinking. Embry was located at a residence, but fled on foot as officers approached.

The State charged Embry with leaving the scene of an accident resulting in serious injury as a class D felony. On February 7, 2005, Embry and the State reached a plea agreement, but the trial court rejected the plea agreement.

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[1] Ind. Code §§ 9-26-1-1 (2004) (subsequently amended by Pub. L. No. 210-2005, § 50 (eff. July 1, 2005)); 9-26-1-8 (2004).

Embry and the State reached another plea agreement, and the trial court ordered a presentence investigation report. On May 31, 2006, a probation officer informed the trial court that Embry failed to respond, did not appear for an interview, and could not be contacted. The trial court issued a warrant for Embry's arrest. On September 25, 2006, Embry failed to appear for a hearing, and the trial court issued another warrant for Embry's arrest. On March 12, 2007, Embry appeared in custody.

On July 20, 2007, Embry and the State reached another plea agreement. Embry pleaded guilty to leaving the scene of an accident resulting in serious bodily injury as a class D felony, and the State agreed to dismiss charges of possession of marijuana and reckless driving under different cause numbers.[2] The State agreed to recommend a term of imprisonment of three years suspended with a "cap time" of three years.[3] Appellant's Appendix Volume I at 50. At the sentencing hearing, the trial court discussed Embry's failure to follow court orders and take advantage of alternative sentencing. The trial court found that the aggravators outweighed "whatever mitigation might be incumbent in the fact that there is no felony history" and "the fact that [Embry] pleaded guilty."

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[2] At the sentencing hearing, the trial court stated that "the State will dismiss two pending criminal cases against you. One, possession of marijuana, and the second, reckless driving." Transcript at 5. The plea agreement indicates that the State will "dismiss: CM-1151, CM913." Appellant's Appendix Volume I at 50. The presentence investigation report reveals that a reckless driving charge under Cause Number 76D01-0310-CM-1151 and a charge of speeding under Cause Number 76D01-0405-FD-506 were to be dismissed as part of the plea agreement. The presentence investigation report does not appear to reveal a charge under "CM913" as referenced by the plea agreement.

[3] In the plea agreement, Embry waived "his right to trial . . . and all constitutional rights accompanying that right . . . ." Appellant's Appendix Volume I at 50.

Transcript at 11. The trial court sentenced Embry to three years in the Department of Correction. At the sentencing hearing, the State moved to dismiss the two other charges under the plea agreement, which the trial court granted. However, the trial court's sentencing order did not include an order of dismissal.

I.

The first issue is whether the trial court abused its discretion in sentencing Embry.[4] Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). A trial court relying upon aggravating and mitigating factors to enhance or reduce a sentence must: (1) identify the significant aggravating factors; (2) relate the specific facts and reasons that the court found those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). We examine both the written sentencing order and the trial court's

[4] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Embry committed his offense prior to the effective date and was sentenced after April 25, 2005. We apply the version of the sentencing statutes in effect at the time Embry committed his offense. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that "[h]ad the new [sentencing] statute become effective between the date of [a defendant]'s crime and his sentencing, the version of the statute in effect at the time of [a defendant]'s crime would have applied"); see also Padgett v. State, 875 N.E.2d 310, 316 (Ind. Ct. App. 2007) (reviewing the defendant's sentencing under the presumptive sentencing scheme when defendant committed his crime before the effective date of the new sentencing scheme, but was sentenced after this date) trans. denied.

comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. Westmoreland v. State, 787 N.E.2d 1005, 1009 (Ind. Ct. App. 2003).

Embry argues that the trial court's oral and written sentencing statements are inadequate for meaningful appellate review. Embry argues that the trial court "made no explicit findings of aggravating and mitigating circumstances." Appellant's Brief at 9. The State concedes that the trial court's written sentencing order lacks the trial court's reasons for imposing the sentence, but argues that the trial court's comments at the sentencing hearing are sufficient. Specifically, the State argues that the trial court found the following aggravators: (A) Embry's conduct throughout this cause including his failure to follow court orders; and (B) Embry's failure in the past to take advantage of alternative sentencing.[5] We will address each separately.

A. Embry's Conduct

The State argues that the trial court found that Embry "flaunt[ed] the legal system" as an aggravator. Appellee's Brief at 7. Embry argues that the record reveals no such explicit finding by the trial court. The trial court stated:

> Well, I have reviewed the pre-sentence report and it appears to me that at this point in time, and this is a conviction that goes back to 2004 and there are substantial delays that were occasioned because Mr. Embry did not follow court orders, appointments had to be rescheduled. I just don't

[5] The State also argues that the trial court found Embry's criminal history and the nature and circumstances of the crime as aggravators. However, we cannot say that the trial court's comments at the sentencing hearing support these aggravators.

> think he gets it and the only, the only option really left to a judge at that point in time is to impose jail time, and serious jail time. So, I think the recommendation contained in the report, notwithstanding whatever mitigation might be incumbent in the fact that there is no felony history. Notwithstanding the fact that he pled guilty, I think the aggravation circumstances that are documented in the report are of a sufficient magnitude that it just isn't appropriate to put Mr. Embry back out into the community without a clear message being sent and substantial jail time imposed. Most people, Mr. Embry, listen. Most people change their behavior. If you don't want to change your behavior or won't change your behavior, then I think you can expect a judge, whether it's me or someone else, presiding in a criminal case is going to take note of your choices and it's going to send you to jail because, quite frankly, it's just too dangerous to the rest of us for you to be running around outside flagrantly disregarding court orders and court directives. Had you heeded those orders at your first opportunity in the criminal court, this whole situation might very well not have occurred. We wouldn't be sitting here today and there wouldn't be a young lady with some very serious injuries. It's about your choices and this is about consequences.

Transcript at 11-12. Based on the trial court's comments, we conclude that the trial court found Embry's conduct as an aggravator and the use of Embry's conduct as an aggravator was not an abuse of discretion. See, e.g., Brown v. State, 698 N.E.2d 779, 781 (Ind. 1998) (holding that, although the trial court failed to "neatly package" aggravating circumstances in the sentencing order, the record demonstrated that the trial court considered the circumstances of the crime in ordering the sentences to be enhanced and served consecutively); Creekmore v. State, 853 N.E.2d 523, 529 (Ind. Ct. App. 2006) (declining to adopt defendant's "magic words" approach in determining whether the trial court identified a sufficient aggravating factor), clarified on denial of reh'g, 858 N.E.2d 230, trans. denied; Perry v. State, 845 N.E.2d 1093, 1096-1097 (Ind. Ct. App. 2006) (holding that, although the sentencing statement was not precisely worded, the trial

court's thought process was clear and adequate), trans. denied; see also Thorpe v. State, 524 N.E.2d 795, 796 (Ind. 1988) (holding that the trial court was not precluded from considering the defendant's general attitude evidenced by his absenting himself from the court's jurisdiction); Totten v. State, 486 N.E.2d 519, 522-523 (Ind. 1985) (holding that the trial court properly found defendant's attitude as an aggravating factor).

B. Failure to Take Advantage of Alternative Sentencing

The State argues that the trial court found Embry's failure to take advantage of alternative sentencing as an aggravator. Embry argues that the trial court never explained what it meant by alternative sentencing or identified the types of alternative sentencing. At the sentencing hearing, the trial court stated that it reviewed the presentence investigation report, in which the probation officer stated:

> [Embry] is thankfully unique in his absolute refusal to cooperate with any proposed alternative sentencing or Court orders, such as terms of bond, probation, appearing in Court, and such. As stated in the original presentence and the update in June of 2006, [Embry] has continued to reoffend while on probation and on bond. He still has an outstanding warrant in Michigan. This means [Embry] cannot participate in either Work Release or Community Corrections, even if he were willing to participate. He has made it very clear that he does not want to be on probation and will not cooperate. [Embry] just will not give this sentencing Court anything to work with.

Appellant's Appendix Volume II at 82. At the sentencing hearing, the following exchange occurred:

> DEFENSE COUNSEL: Ah, no evidence to present, Your Honor. As far as argument is concerned, this is my client's first felony. He has no priors and I am asking the court that he be sentenced to one and one half years in jail.

> COURT: He has no prior felonies?
>
> DEFENSE COUNSEL: That is correct.
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> COURT: He does have priors, however.
>
> DEFENSE COUNSEL: I said prior felonies.
>
> COURT: No, you didn't, you said he has no priors. You said it was his first felony, he has no priors. He does have priors, he has misdemeanor convictions, does he not?
>
> DEFENSE COUNSEL: Yes.
>
> COURT: Okay. So, and those are important because they detail, um, opportunities for alternative sentencing that Mr. Embry has not taken advantage of as documented in the pre-sentence report, ah, thereby persuading the court that further opportunities should not be necessarily forthcoming. No point in putting him in a situation where he has demonstrated in the past that he is unable to perform.

Transcript at 10.

Based on the trial court's comments and the presentence investigation report, we conclude that the trial court found Embry's failure to take advantage of alternative sentencing as an aggravator and the use of this aggravator was not an abuse of discretion. See, e.g., Brown, 698 N.E.2d at 781 (holding that, although the trial court failed to "neatly package" aggravating circumstances in the sentencing order, the record demonstrated that the trial court considered the circumstances of the crime in ordering the sentences to be enhanced and served consecutively); see also Armstrong v. State, 742 N.E.2d 972, 981 (Ind. Ct. App. 2001) (holding that the aggravator that defendant was in

need of more correctional treatment based on the defendant's prior unsuccessful attempts at rehabilitation through prison and probation was valid).

In summary, the trial court's sentencing statement was adequate, and the trial court found two valid aggravators. The trial court found that the aggravators outweighed "whatever mitigation might be incumbent in the fact that there is no felony history" and "the fact that he pleaded guilty." Transcript at 11. We cannot say that the trial court abused its discretion. Garrett v. State, 714 N.E.2d 618, 623 (Ind. 1999) (holding that the trial court did not abuse its discretion when it found valid aggravating circumstances).

Embry also argues that the trial court failed to dismiss the two unrelated charges pursuant to the plea agreement. The State concedes that "[a]ssuming those causes have yet to be dismissed, this Court should remand this cause to the trial court with orders that those causes be dismissed." Appellee's Brief at 13. At the sentencing hearing, the State moved to dismiss the two other charges under the plea agreement, which the trial court granted. However, the trial court's written sentencing order did not include an order of dismissal. Consequently, we remand to the trial court to enter an order of dismissal for the two other charges pursuant to the plea agreement.

II.

The next issue is whether Embry's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the

offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Embry requests that we impose the presumptive sentence of one and a half years.

Our review of the nature of the offense reveals that Embry was driving a vehicle containing three other passengers in Steuben County. Embry missed a curve and struck a utility pole. Embry and two of the passengers fled the scene on foot. Snellenberger, a passenger, suffered a severely fractured right lower leg and remained at the scene. The police located two of the passengers who identified Embry as the driver and indicated that Embry had been drinking. Embry was located at a residence, but fled on foot as officers approached. Snellenberger will never regain full use of her leg and will have a permanent limp.

Our review of the character of the offender reveals that in November 2001, Embry was charged with disorderly conduct and placed on informal juvenile probation.[6] In September 2002, Embry was charged with minor in possession of alcohol and a curfew violation and placed on informal juvenile probation for six months. In May 2003, Embry was charged with minor in consumption of alcohol.

In October 2003, Embry was charged with reckless driving. The probable cause affidavit stated that, on August 20, 2003, Embry passed a vehicle with an "off-duty

[6] Embry was born on March 4, 1986.

officer in it 'from the rear while on a slope or curve where vision is obstructed.'" Appellant's Appendix Volume II at 56. At that time, Embry was on juvenile probation and on deferral for a speeding ticket. Embry failed to appear in court for his initial hearing, and the court had to issue a warrant. This offense was dismissed as a part of the plea agreement.

As an adult, Embry committed the current offense in May 2004. During the course of the proceedings, the trial court issued two warrants for Embry's arrest due to his failure to respond to the probation department and his failure to appear at a hearing. In August 2004, Embry was charged with possession of a controlled substance in Michigan, while he was out on bond for reckless driving and the current offense. In January 2005, Embry was arrested in Michigan, and "[a]ccording to [Embry], he will be charged with Operating a Vehicle Under the Influence of marijuana." Id. At that time, Embry was on a deferral from the earlier Michigan charge and on bond in his two Indiana cases.

After due consideration of the trial court's decision, we cannot say that the sentence of three years imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Loyd v. State, 787 N.E.2d 953, 962 (Ind. Ct. App. 2003) (holding that defendant's maximum sentence for leaving the scene of an accident involving death as a class C felony was not inappropriate).

For the foregoing reasons, we affirm Embry's sentence for leaving the scene of an accident resulting in serious bodily injury as a class D felony and remand to the trial court to enter an order of dismissal for the two other charges pursuant to the plea agreement.

Affirmed and remanded.

BARNES, J. and VAIDIK, J. concur